

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Exclusive Service Contracts for Provision)
of Video Services in Multiple Dwelling)
Units and Other Real Estate Developments)

MB Docket No. 07-51
(NPRM FCC 07-32)

REPLY COMMENTS OF THE NEW JERSEY
DIVISION OF RATE COUNSEL

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Introduction

As a result of Rate Counsel's review of the initial comments submitted in response to the Notice of Proposed Rulemaking (NPRM), Rate Counsel reaffirms its prior recommendation as to the FCC's lack of authority regarding regulating exclusive service contracts present (exclusive contracts) and the significant issues that are implicated, if the FCC were to follow through and attempt to regulate such exclusive contracts. While the issues identified regarding exclusive contracts are important to states and consumers, the FCC simply lacks the authority to regulate in this area. Congress has not authorized the FCC to regulate this area. The FCC is not the proper forum to address how exclusive contracts should be regulated. Numerous comments correctly conclude that the FCC lacks any statutory authority to pursue the issue of exclusive contracts. In addition, there are significant Constitutional barriers that preclude FCC action in this area that is reserved to the states. The FCC should close the proceeding and leave such issues to states.

I. The FCC Lacks Statutory Authority to Regulate Exclusive Contracts.

Numerous comments take exception to the FCC's contentions concerning its statutory authority for regulating exclusive contracts.¹ Rate counsel concurs with these commentators that no statute authorizes the FCC to make rules in this area, and that the

¹/ See Comments of Comcast Corporation, *In the Matter of Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, filed July 2, 2007; Comments of the American Cable Association, filed July 2, 2007; Comments of the Real Access Alliance, filed July 2, 2007; Comments of National Cable & Telecommunications Association, filed July 2, 2007; Comments of ACUTA, Inc.; The Association For Telecommunications Professionals in Higher Education, filed July 18, 2007.

FCC may not legally infer such authority based on a notion of an implied delegation of power.

Furthermore, Congress explicitly reserved to the states a specifically defined role in regulating cable under Title VI.² Section 636 gives the states power to regulate cable services.³ Specifically, Section 636(a) states that Title VI does not limit state authority, in “matters of public health, safety, and welfare.” This phrase is a term of art describing the states’ normal police powers, of which contract and real property law is a part. Next, Section 636(b) gives the states jurisdiction over cable service, and states that Title VI does not restrict states from exercising jurisdiction consistent with this title.

The plain meaning of these sections read as a whole, show that Section 636 is an explicit limitation on the FCC’s regulatory authority to displace states in this area. Coupled with this provision are other provisions of the Act that reinforce the conclusion that the FCC lack authority in this area. Congress has not explicitly or implicitly limited the states’ roles (police powers) in this area and for Congress to do so would raise substantial constitutional concerns. As a result, the FCC can not usurp state authority in this area. The claim that Congress implicitly intended to authorize the FCC to usurp state authority over contract law, rules regarding deeds and covenants, and the granting of easements has no support in law. These areas are reserved to the states under the Constitution.

^{2/} 47 U.S.C. § 556.

^{3/} Id.

Some comments contend that Section 628(b) confers authority on the FCC.⁴ The NPRM asserts that Section 628(b) is ambiguous as to what enforcement means, thus allowing the FCC to interpret the statute as giving the FCC rulemaking authority over exclusive contracts. However, Section 628 as a whole is clear on its face and the FCC may not invent an ambiguity to rationalize that it has authority in this particular area. *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999).

II. The FCC's Proposed Action in the Area is Runs Afoul of the Constitution.

A. FCC Action Would Violate Federalism and Other Doctrines Reserving Certain Rights to the States.

One of the core principles of the Constitution is federalism, where the federal government and the states share the responsibilities of governing as dual sovereigns. Though there is a hierarchy, one sovereign is not to intrude upon the powers and privileges of the other. The FCC's proposed actions would interfere with and violate the core principal of Federalism and the sovereignty of states.

The states are granted a specific role in Federalism, partially so that they may study a problem, consider the problem in the context of their state, and experiment with policies addressing the problem. "One of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"⁵ Here, the FCC attempts to invade

⁴/ 47 U.S.C. § 548(b).

⁵/ *Gonzalez v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J. dissenting).

and limit states' roles and remove states from an areas carved out under Federalism. The FCC cannot do by rule what it can not do by law.

As discussed above, under the Constitution the authority to legislate real property and contract law is reserved to the states. Exclusive contracts involve matters properly reserved to the states, and are therefore within the jurisdiction of the states. The position advocated by the FCC is contrary to the core principal of Federalism. While the FCC may be concerned with the wisdom of exclusive contracts, Federalism precludes the FCC from mandating what states can do in this area.

The FCC's proposals are inconsistent with and run afoul of Constitutional requirements, including Federalism and the 10th Amendment, and impermissible preemption.⁶

10th Amendment

The 10th Amendment provides that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."⁷ This is the core underpinning of Federalism and the dual roles of the Federal Government and states. See *Printz v. United States*, 521 U.S. 898 (1997). The 10th Amendment protects a state's power to make and enforce laws concerning land use, real property and contracts, because the Constitution does not give that authority to the Federal government. In addition, the Supreme Court has held that "[w]hile Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the states, the Constitution has never been understood to confer

⁶ / It is also possible that 11th Amendment issues are implicated depending upon whether the parties to the contracts are acting on behalf of the state such as home rule entities or state universities.

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⁷ / U.S. Const. amend. X.

upon Congress the ability to require the states to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

In this proceeding, the FCC suggests that its proposed actions are pursuant to a delegation of Congressional power to issue rules. However, the FCC enjoys no more power than it was given by statute, the FCC may not create rights without the expressed authority from Congress and the FCC has no more power than Congress enjoys. Congress has not authorized the FCC to act in this area.

Rate Counsel rejects the FCC's claim that the commerce clause grants the necessary authority to do what the FCC claims it can do. Rate Counsel concedes that the FCC acts under Congress' commerce clause power. Courts, however, have opined that "the scope of the interstate commerce power 'must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'" *United States v. Lopez*, 514 U.S. 549, 557 (1995). The FCC's actions simply violate the 10th Amendment for the FCC looks to strip away state control over purely local concerns. While video service may flow through interstate commerce at times, the Congressional scheme evidenced in Title VI precludes the FCC from taking the actions that it seeks.

Congress has not authorized Preemption in this Area.

The FCC lacks any Congressional direction to support any claim of preemption as claimed in this proceeding. The courts have recognized several types of preemption and none apply here. The first way state law may be pre-empted is through congressional

intent. *See Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991). Congressional intent may be found in the expressed language of the statute, or it may be inferred from the degree to which Congress has legislated in a particular area. This latter form of pre-emption, known as field pre-emption, occurs when Congress has legislated to such a level that Congress has left no room for state regulation. *Id.* As discussed above, the FCC lacks the authority to do what it says it can do in the NPRM. Similarly, Congress specifically reserved and set forth explicit protections as to the role of states under Section 636, as well as delineating the separate roles of the FCC and states in other provisions of Title VI. Congress has preserved state authority and state police powers to the extent that any state enactments are consistent with the federal scheme. Title VI lacks any basis to support a claim of explicit or field pre-emption. Again, the FCC must leave regulating exclusive contracts to the states.

B. The FCC's Proposed Actions Would Violate the Separation of Powers

Under this NPRM, the FCC proposes to regulate an area without Congressional approval. The decision to formulate rules in an area outside the enabling statutes is a legislative act by an executive body. Such action runs afoul of the separation of powers found which the Constitution protects. The FCC as an executive agency may not enlarge the scope of its own authority, and the FCC may not perform legislative acts that are reserved to the legislative branch of government. The course of action proposed by the FCC is simply inconsistent with separations of powers established by the Constitution and protected by the Courts.

Conclusion

For the reasons discussed upon, the FCC should close this proceeding and leave the issues raised herein to the states where the issues belong.

Respectfully submitted,

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